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CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 266

In the Matter

of

GEORGE A. CARDEN,

Bankrupt.

McCLAVE & COMPANY,

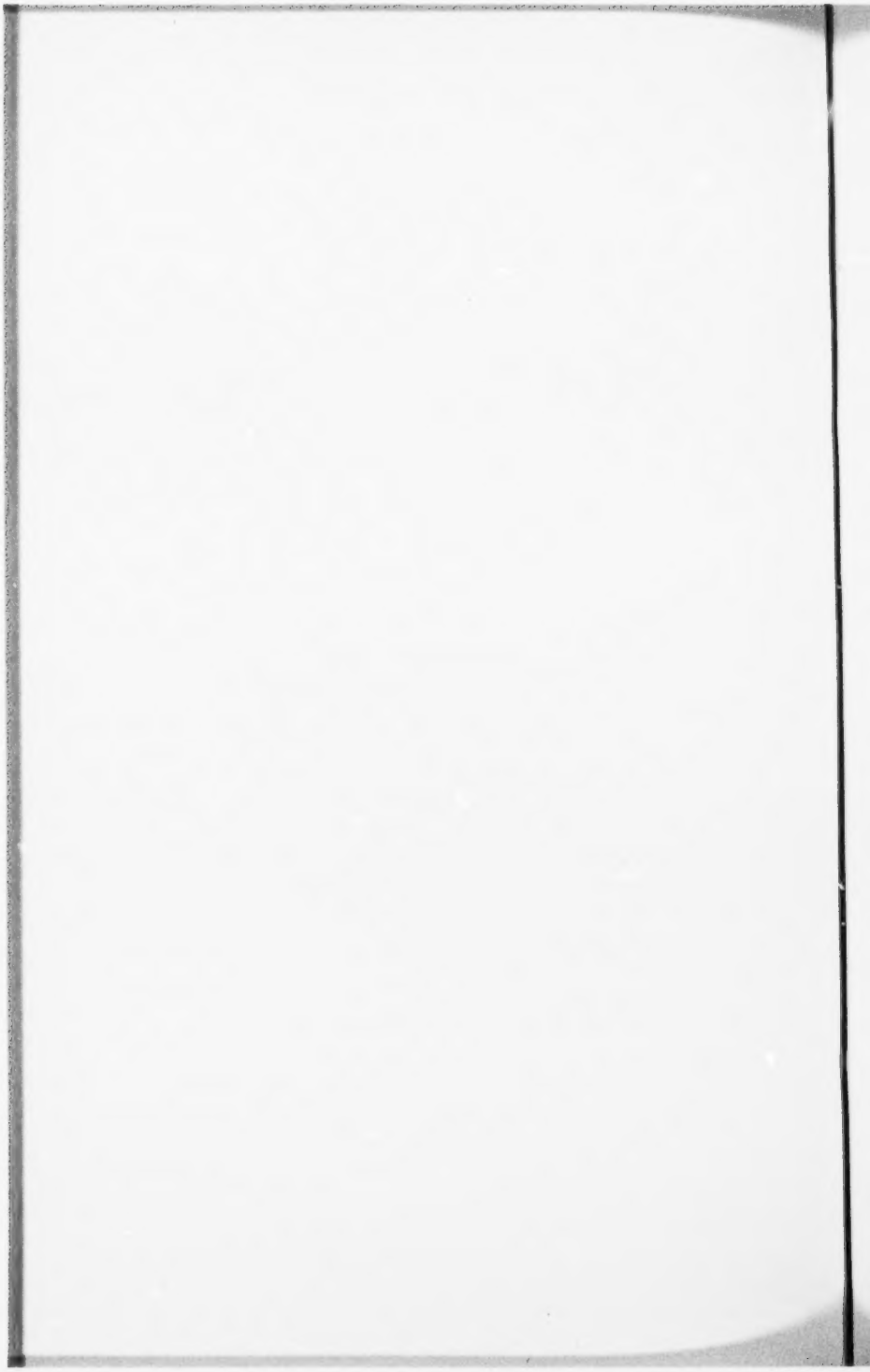
Petitioners,

GEORGE A. CARDEN, DANIEL LOEB and Petitioning Creditors,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SAMUEL C. DUBERSTEIN,
Attorney for Petitioners.



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Petitioning Creditors,
Appellees.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Clifford H. McCall and Arthur Sewell, 2nd, copartners doing business as McClave & Co., respectfully shows to this Honorable Court and alleges:

A.

Summary Statement of the Matter Involved.

They are the petitioners herein.

This is a petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for

the Second Circuit, entered the 14th day of April, 1941 (page 49), which affirmed the order of the Honorable District Judge, Alfred C. Coxe of the United States District Court for the Southern District of New York, entered March 11, 1940 (pages 4-5).

The Circuit Court of Appeals affirmed the order of the District Court which had denied petitioners' motion for an order dismissing a purported involuntary petition in bankruptcy and vacating all subsequent proceedings thereunder (pages 45-49). Petitioners' motion had been made in their capacity as creditors of the bankrupt. The motion was denied, and the order of denial subsequently affirmed, upon the ground that Sections 18 (b) and 59 (f) of the National Bankruptcy Act (known as the Chandler Act) which became effective in 1938 had, in the opinions of the lower courts, deprived creditors of their previous right to move to vacate the bankruptcy petition and the subsequent proceedings.

Petitioners will first set forth the facts, and thereafter the sections of the statutes involved.

(1) Facts.

On February 18, 1933, a purported involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against the alleged bankrupt herein (pages 39-42). It consisted of a printed form and included the standard phrase as to the occurrence of an act of bankruptcy "within four months preceding the filing of this petition" (page 40). It had, however, been signed by the three petitioning creditors approximately one year prior to the date of its filing (pages 41-42). On its very face, therefore, it did not—and, in fact, could not—have referred to an act of bankruptcy occurring within four months preceding the date of its filing.

The subpoena which had been issued on the date of the filing of the alleged petition was never served upon the bankrupt (page 35). For six and one-half years at least, neither bankrupt nor creditor nor anyone else performed a single act in recognition of the existence of a petition in bankruptcy. Upon the contrary. The $20. balance remaining over from the sum deposited in Court upon the filing of the purported petition was returned to the attorney for the petitioning creditors (page 35). And within ten days after the alleged petition had been filed, the Empire Trust Company, a creditor in the sum of $98,000., caused a receiver to be appointed in supplementary proceedings under its judgment against the bankrupt in the courts of New York State (pages 28, 30). This receivership was thereafter duly extended to ten other judgments which had been obtained against the bankrupt and whose aggregate total exceeded $1,600,000 (page 30).

One of the judgments to which this state court receivership was extended was that owned by these petitioners. The judgment was in the amount of $662,354.68. The state court receivership was extended to it on July 26, 1937 (page 30). The position of petitioners' judgment, as determined by the date of the extension to it of the state court receivership, was extremely advantageous. Its lien was junior to the lien of judgments totalling approximately $113,000, but senior to that of eight other judgments aggregating more than $1,500,000 (page 30).

Sometime after the state court receivership had been extended to these judgments, certain of the creditors met together for the sole and conceded purpose of hitting upon a plan to deprive creditors of the priorities which they had obtained in the proceedings in the state court (page 19). At that meeting, it was then for the first time "discovered" that an alleged bankruptcy petition had been filed some six years before (page 19). Accordingly, it was now determined to press that old petition to an ad-

judication in order to upset the priorities acquired in the intervening state court receivership (page 19). Creditors and bankrupt cooperated (page 19). On October 4, 1939, the attorney for the petitioning creditors attempted to revive the old petition by moving for an order permitting them to repay to the Clerk of the Court the sum of $20 which had been returned to their attorney upon their abandonment of the petition, and for the issuance of an alias subpoena to the alleged bankrupt in place of the original subpoena which had not been served (pages 33-4). The moving papers were served solely upon the bankrupt (page 34), who defaulted (page 31). Upon the bankrupt's default in answering the alias subpoena, an alleged adjudication in bankruptcy was filed in the District Court on December 21, 1939 (pages 32-3). The alleged order of adjudication contained the recital that it was pursuant to the petition filed on February 18, 1933 (page 32).

Promptly upon learning of the foregoing attempt to deprive their judgment of its lien, petitioners moved to vacate the adjudication in bankruptcy and all proceeding thereunder (pages 6-14).

The sections of the statute which are involved, and the determining considerations, will be considered in the subdivisions which follow.

(2) Statutes Involved.

The denial to these petitioners of the right to vacate these alleged bankruptcy proceedings has been predicated, in both the lower courts, upon provisions of the present Bankruptcy Act which differ from the provisions in effect under the former Bankruptcy Act. Accordingly, petitioners will set forth the relevant provisions in both Acts in parallel columns:

Old Bankruptcy Act	Chandler Act Effective June 22, 1938.
Section 18 (b). The bankrupt, or any creditor, may appear and plead to the petition within five days after the return date, or within such further time as the court may allow.	Section 18 (b). The bankrupt and in the case of a petition against a partnership, any general partner or, in the case of a petition in behalf of a partnership, any general partner not joining therein, may appear and plead to the petition within five days after the return date or within such further time as the court may allow.
Section 59 (f). Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.	Section 59 (f). Creditors other than the original petitioners may at any time enter their appearance and join in the petition.

B.

Jurisdiction of this Court.

(1) *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court is based upon Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925 (43 Stats. 938), also found in 28 U. S. C. A., Section 347 (a) and Section 24 (c) of the Bankruptcy Act.

(2) *Timeliness of Application for Writ of Certiorari.*

The date of the entry of the order, judgment and decree of the Circuit Court of Appeals sought to be reviewed is April 14, 1941. The date of the filing of a certified copy of the record and of the Petition for a Writ of Certiorari and the Brief in support thereof is July 12, 1941.

(3) *Opinions of the Courts below.*

The Circuit Court's opinion was rendered on March 18, 1941 and appears at pages 45-48 of the record. It is officially reported in 118 Fed. (2nd) 677. The District Court's opinion was rendered on February 29, 1940, and appears at page 5 of the printed record. It was not officially reported.

C.

The Questions Presented.

The record presents the following questions:

1. Is a purported involuntary bankruptcy petition, which fails to allege the commission of an act of bankruptcy within four months preceding the filing, jurisdictionally defective? If so, does the Chandler Act prevent a creditor from attacking bankruptcy proceedings thereunder?

2. Does the Chandler Act permit a creditor to vacate bankruptcy proceedings in the absence of a jurisdictional defect upon the ground, simply, "that the proceeding ought not to be allowed to proceed"? If so, should petitioners' motion have been granted in this case?

3. May the Chandler Act constitutionally be employed to deprive creditors of a remedy which had been available to them under the old Bankruptcy Act effective on the date of the filing of the petition, in a situation in which the withdrawal of the remedy must produce the loss of a vested substantive right? If not, should the Chandler Act have been deemed applicable to petitioners' motion in this case?

D.

Reasons Relied on for the Allowance of the Writ.

The questions of law involved are concerned with a Federal statute, to wit: the Chandler Act. Questions (1) and (2) pertain to the manner in which that statute should be interpreted, if applied. Question (3) is concerned with the question of its applicability to a proceeding initiated by an involuntary petition filed under the old Bankruptcy Act; this involves, in part, a question of constitutionality. These questions have not been passed upon by this Court. In fact, they have not been passed upon by any of the Circuit Courts other than as implicit in the decision in the case at bar.

The answers to these questions which are implicit in the decision of this Circuit Court of Appeals are directly contrary to the doctrines which had been announced in similar situations arising under the old Bankruptcy Act. Under the old Act, anyone might attack a petition or adjudication for jurisdictional defect, even though not expressly authorized by statute. *In re Ettinger* (C. C. A. 2nd Cir.), 76 Fed. (2nd) 741; *Chicago Bank of Commerce* v. *Carter* (C. C. A., 8th Cir.), 61 Fed. (2nd) 986; *In re American Bond & Mortgage Co.*, (C. C. A., 7th Cir.), 61 Fed. (2nd) 875, aff'd 289 U. S. 165; *In re Vassar Foundry*

Co., (D. C., E. D. Michigan), 293 Fed. 248, aff'd (C. C. A. 6th Cir.) 2 Fed. (2nd) 240; *In re Day*, (D. C., D. Maryland), 22 Fed. Supp. 946; *In re New York Tunnel Co.*, (C. C. A., 2nd Cir.), 166 Fed. 284. Even the voluntary petition, normally invulnerable to attack by creditors, lost that invulnerability when jurisdictionally defective. *In re Ettinger* (C. C. A., 2nd Cir.), 76 Fed. (2nd) 741; *Chicago Bank of Commerce* v. *Carter* (C. C. A., 8th Cir.) 61 Fed. (2nd) 986; *In re American Bond & Mortgage Co.*, (C. C. A., 7th Cir.), 61 Fed. (2nd) 875, aff'd 289 U. S. 165; *In re Vassar Foundry Co.*, (D. C., E. D. Michigan), 293 Fed. 248, aff'd (C. C. A., 6th Cir.), 2 Fed. (2nd) 240. Moreover, this Court stated that even persons not authorized by statute to attack the proceedings could do so "on grounds, whether jurisdictional or not, that the proceedings ought not to be allowed to proceed". *Securities & Exch. Com'n.* v. *U. S. R. & Imp. Co.*, 310 U. S. 434, 457-8. Finally, it has been held that the rights of creditors were determined as of the date of the filing of the petition itself (*U. S.* v. *Marxen*, 307 U. S. 200, 207) and could not be divested by the retroactive application of a subsequently enacted statute. *In re John G. Gasteiger & Co. Inc.*, (C. C. A., 2nd Cir.), 25 Fed. (2nd) 642, 643; *Jacobus* v. *Colgate*, 217 N. Y. 235, 241 (per Cardozo, J.).

These questions are important. This Court should determine whether the new Act is to become the basis of doctrines directly contrary to vital principles which had been universally acknowledged and followed before its passage.

The considerations herein set forth will be amplified in the brief submitted herewith.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding

that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings of the case, and that the said decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioners may have such other, further and different relief in the premises as to this Honorable Court may seem just and proper, and your petitioners will ever pray.

Dated, New York, July 10th, 1941.

McClave & Co.,
Petitioners.

By: Clifford H. McCall,
Partner.

State of New York }
County of New York } ss.:

Clifford H. McCall, being duly sworn, deposes and says that he is one of the partners of McClave & Co., a copartnership consisting of Arthur Sewell, 2nd, and self and is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof to be true.

Clifford H. McCall.

Sworn to before me this
10th day of July, 1941.

Edward M. Stoll,
Notary Public West. Co.,
Ctf. filed N. Y. Co., Co. Clk. No. 1605,
Comm. Expires March 30, 1943.

(Seal)